IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

***e*PLUS INC.,**	)	
	)	
Plaintiff,	)	**Civil Action No. 3:09-CV-620 (REP)**
	)	
v.	)	
	)	
LAWSON SOFTWARE, INC.,	)	
	)	
	)	
	)	
Defendant.	)	

PLAINTIFF ePLUS, INC.'S REPLY BRIEF IN FURTHER SUPPORT OF MOTION *IN LIMINE* NO. 9: TO EXCLUDE TESTIMONY, EVIDENCE, OR ARGUMENT OF IMPROPER COMPARISONS BETWEEN ACCUSED PRODUCTS AND COMMERCIAL EMBODIMENTS OF EPLUS, INC. AND ITS PREDECESSORS FOR THE PURPOSE OF PROVING NON-INFRINGEMENT

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Defendant Lawson Software, Inc. ("Defendant" or "Lawson") concurs that it may not attempt to compare commercial embodiments of Plaintiff *e*Plus, Inc. ("*e*Plus") and its predecessors to Defendant's accused products for the purposes of analyzing infringement. Defendant argues, however, that evidence of *e*Plus's commercial embodiments may be relevant to other issues, specifically, damages, obviousness (secondary considerations), and willfulness. While the relevance or admissibility of any particular evidence for those limited purposes seems unlikely, that question should not be resolved on this motion; the parties appear to agree that, at a minimum, evidence of *e*Plus's or its predecessors' commercial embodiments cannot be considered for the purpose of an infringement analysis.

As with *e*Plus's eighth motion *in limine,* this motion does no more than acknowledge black-letter patent law, as evidenced by the fact that the Model Jury Instructions of the American Intellectual Property Association ("AIPLA") provide the same direction to the jury. *See* Ex. 11 (AIPLA Model Jury Instruction No. 3.0 Infringement – Generally) ("***in deciding the issue of infringement you may not compare [the Defendant]'s accused [[product] [method]] to [the Plaintiff]'s commercial [[product] [method]]***. Rather, you must compare the [Defendant]'s accused [[product] [method]] to the claims of the [abbreviated patent number] patent when making your decision regarding infringement.") (emphasis added).[1] In the *SAP* litigation this Court provided this same instruction to the jury.

At a minimum, therefore, *e*Plus's demonstration system of its commercial embodiment, produced in discovery, should be excluded from evidence. *See* Dkt. No. 281 at 3. Defendant does not proffer any reason why this demonstration system would be relevant for any of the limited purposes identified in its opposition brief. The *e*Plus demonstration system would only

be used, improperly, to suggest comparison with Defendant's accused products, and in that respect would confuse and mislead the jury as to the proper infringement analysis.

*e*Plus therefore respectfully requests that the Court grant its motion *in limine* and rule that the commercial embodiments of *e*Plus and its predecessors may not be admitted into evidence for the purpose of infringement.

Respectfully submitted,

July 12, 2010

/s/

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[1] The referenced exhibit is included within the Appendix of Exhibits filed concurrently with *e*Plus's reply briefs in support of its motions *in limine*.

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of July, 2010, I will electronically file the foregoing

PLAINTIFF ePLUS, INC.'S REPLY BRIEF IN FURTHER SUPPORT OF MOTION *IN LIMINE* NO. 9: TO EXCLUDE TESTIMONY, EVIDENCE, OR ARGUMENT OF IMPROPER COMPARISONS BETWEEN ACCUSED PRODUCTS AND COMMERCIAL EMBODIMENTS OF EPLUS, INC. AND ITS PREDECESSORS FOR THE PURPOSE OF PROVING NON-INFRINGEMENT

with the Clerk of Court using the CM/ECF system which will then send a notification of such filing (NEF) via email to the following:

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